No. 01-1184

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

FRANCISCO JIMENEZ RECIO AND ADRIAN LOPEZ-MEZA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondents do not defend the court of appeals' holding on the merits. Nor do they dispute that it conflicts with black-letter principles of conspiracy law and reinforces a conflict in the circuits. Instead, they argue that the government did not properly raise the question presented below, and that the court of appeals' holding does not significantly obstruct enforcement of federal criminal law. Those contentions are incorrect, and this Court's review is warranted.

1. The petition for certiorari presents the question whether a conspiracy automatically terminates when law enforcement authorities frustrate its objective. In *United States* v. *Cruz*, 127 F.3d 791 (1997), cert. denied, 522 U.S. 1097 (1998), the Ninth Circuit held that the seizure of drugs whose distribution is the object of a conspiracy automatically terminates the conspiracy. In

this case, the court of appeals applied that rule and held that, because there was insufficient evidence that respondents either joined the conspiracy before the seizure of the drugs or participated in a conspiracy with broader goals not limited to delivery of the particular cocaine that was seized, respondents' conspiracy convictions had to be reversed.

The rule announced in *Cruz* and applied in this case is contrary to the established principle that the duration of a conspiracy depends on the conspiratorial agreement, not the factual possibility or likelihood that it will achieve its objective. See Pet. 10-12 (citing, *inter alia*, *Salinas* v. *United States*, 522 U.S. 52, 64, 65 (1997); *Grunewald* v. *United States*, 353 U.S. 391, 397 (1957); and *Osborn* v. *United States*, 385 U.S. 323, 332-333 (1966)). The *Cruz* rule also squarely conflicts with the First Circuit's decision in *United States* v. *Belardo-Quiñones*, 71 F.3d 941 (1995), which upheld a defendant's conviction on facts indistinguishable from those here and expressly rejected the rule adopted by the Ninth Circuit in *Cruz* and applied here. See Pet. 12-13. More generally, the Ninth Circuit's holding that "impossibility" terminates a conspiracy conflicts with decisions of at least five other courts of appeals. See Pet. 14-15.

Respondents do not contest that the Ninth Circuit's decisions in this case and in *Cruz* conflict with the basic principles of conspiracy law discussed above. Respondents also do not contest that the Ninth Circuit's decision in this case conflicts with the First Circuit's decision in *Belardo-Quiñones* and the legal rulings of the other five courts of appeals cited in the petition. For those reasons, certiorari is warranted in this case.

2. Respondents do contend that the government "did not ever challenge the viability of the *Cruz* decision in District Court or on direct appeal before the Ninth Circuit panel." Br. in Opp. 8. That contention provides no basis for denying further review.

a. In *United States* v. *Williams*, 504 U.S. 36, 41 (1992), this Court made clear that its ordinary practice does not preclude review of a question if it was "pressed *or* passed upon" by a court of appeals (emphasis added). In *Williams*, this Court reversed a court of appeals' holding that the government had to present exculpatory evidence to a grand jury. The court of appeals had adopted that requirement in an earlier case "over the protests of the Government, but in a judgment that was nonetheless binding precedent for the panel below." *Id.* at 44. Although the government in *Williams* itself did not expressly argue to the court of appeals that its earlier precedent was incorrect or should be overruled, the Court explained that the government's failure to raise the validity of the earlier circuit precedent was no bar to this Court's review of the rule underlying that precedent.

The Court rejected as "unreasonable" the proposition "that a party demand overruling of a squarely applicable, recent circuit precedent, even though that precedent was established in a case to which the party itself was privy and over the party's vigorous objection, and even though no 'intervening developments in the law' had occurred." 504 U.S. at 44 (citations omitted). To the contrary, the Court explained that "[i]t is a permissible exercise of [the Court's] discretion to undertake review of an important issue expressly decided by a federal court where, although the petitioner did not contest the issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case the correctness of

that precedent." *Id.* at 44-45. The Court has adhered to that principle in subsequent cases. See, *e.g.*, *United States* v. *Vonn*, 122 S. Ct. 1043, 1046 n.1 (2002); *United States* v. *Wells*, 519 U.S. 482, 487-488 (1997).

b. The same principle is controlling here. As in *Williams*, the court of appeals in this case expressly relied on the rule that the government challenges in the petition for certiorari. The court of appeals began its discussion with a statement of the *Cruz* rule, see Pet. App. 2a-3a, and then framed the question presented as whether there was sufficient evidence to support respondents' convictions under that rule. See *id.* at 3a ("[W]e must determine whether any rational jury could find * * * that [respondents] were involved in the conspiracy prior to the initial seizure of the drugs."). The court rested its reversal of respondents' conspiracy convictions squarely on its conclusion that there was insufficient evidence to satisfy the *Cruz* rule.

In addition, as in *Williams*, the government in this case vigorously challenged the rule that is at issue here "as a party to the recent proceeding [*i.e.*, *Cruz*] upon which the lower courts relied for their resolution of the issue." 504 U.S. at 45. Indeed, the government not only argued to the panel in *Cruz* that the rule it adopted was mistaken, but also unsuccessfully sought rehearing en banc in that case.[1] Moreover, the government again unsuccessfully sought rehearing en banc in this case on the question whether the *Cruz* rule should be abandoned.[2]

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[1] As reflected on the Ninth Circuit's docket, rehearing en banc in *Cruz* was denied on January 23, 1998.

[2] The government's petition presented that issue as the first question presented. See Pet. on Reh'g 5 ("Whether a conspiracy to distribute narcotics terminates as a matter of law when the narcotics are seized by law enforcement agents."). The first argument heading in the petition stated: "*Cruz*, which dictated the outcome in the present case, flies in the face of black letter conspiracy law and conflicts with decisions in this and other circuits." *Id.* at 9. The responses to the petition for rehearing argued that the *Cruz* rule was correct. Respondent Lopez-Meza's first argument heading was: "*Cruz* should not be overturned." Lopez-Meza Response to Pet. for Reh'g 3. The first sentence of respondent Recio's response stated that "[t]he Petition has little to do with these Appellants and much to do with the Government's view of *United States* v. *Cruz*" and then recognized that "[i]n that regard, the Government argues that *Cruz* is not good law." Recio Response to Pet. for Reh'g 2. The responses did not contend that the government had in some way forfeited the opportunity to challenge the *Cruz* rule. Moreover, Judge O'Scannlain's dissent from denial of rehearing en banc plainly recognized that the validity of *Cruz* was properly before the en banc court and strongly urged that *Cruz* should be overruled. See Pet. App. 46a-58a.

As in *Williams*, the government has never "concede[d] * * * the correctness of th[e] precedent" challenged in the petition for certiorari. 504 U.S. at 45. Although the government argued to the panel of the court of appeals in this case that respondents' convictions could be sustained even under *Cruz*, that argument was based on the proposition that *Cruz* was governing circuit precedent; the government did not concede that *Cruz* was correct.[3] Accordingly, the

[3] As respondents note, the government did state in the district court that it "*does not dispute* the basic and general conspiracy law upon which the [District] Court has made its decision, namely, that a conspiracy is deemed to continue 'until there is affirmative evidence of abandonment, withdrawal, disavowal or *defeat of the object* of the conspiracy." Br. in Opp. 11 (emphasis added). That statement reflected the fact that the district court could not overrule or disregard *Cruz*. Respondents also correctly note that the government informed the district court that it "agree[d] with the

question presented in the petition is properly before the Court, and respondents' argument to the contrary should be rejected.

c. Respondents observe (Br. in Opp. 8-9) that the jury was instructed to make findings under a *Cruz* theory in order to return a verdict of guilty. The instructions in this case provide no basis for denying review. The jury was instructed that, in order to find guilt, it had to find all of the elements of a conspiracy under settled, pre-*Cruz* law. See Pet. App. 73a-75a. It was also instructed in accordance with *Cruz*, that "[a] defendant may only be found guilty * * * if he joined the conspiracy at a time when it was possible to achieve the objective of that conspiracy." *Id.* at 75a-76a. In particular, the jury was instructed that to find guilt it had to make one of two findings. The jury was told it could find guilt under a "larger conspiracy" theory if it found that the objects of the conspiracy embraced drug trafficking "beyond [the] * * * controlled substances * * * seized by authorities * * * on November 18, 1997" and respondents "knew or had reason to know of the scope of the larger conspiracy and embraced its objective." *Id.* at 76a. Alternatively, the jury was told it could find guilt on a "preseizure conspiracy" theory if it found that the conspiracy's "sole object" was trafficking in the drugs that were seized on November 18 and respondents "joined or became * * * member[s] of the conspiracy prior to" the time and date of seizure. *Ibid.*

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essential formulation of the primary issue, namely whether 'a rational trier of fact [could] find that [respondents] were members of the conspiracy prior to the seizure of the drugs.'" *Ibid.* That indeed was the correct formulation of the primary issue, under *Cruz*, that the district court had to decide.

The court of appeals held that the evidence was insufficient to support either the "larger conspiracy" or the "pre-November 18" findings and reversed respondents' convictions on that basis. If this Court holds that neither of those findings was necessary, however, respondents' convictions should be affirmed. Neither the "larger conspiracy" nor the "preseizure conspiracy" instructions were necessary under a correct understanding of conspiracy law, and any failure of proof on the theories embodied in those instructions would be of no moment, if this Court were to reject the *Cruz/Recio* theory. Moreover, a jury that made either the "larger conspiracy" or the "preseizure conspiracy" findings necessarily found as well that respondents participated in a simple post-seizure conspiracy. If the jury rested its verdict on a finding that respondents were members of a "larger conspiracy" whose objects involved trafficking in "substances beyond those seized by authorities," Pet. App. 76a, then the jury necessarily found at least that the conspiracy included trafficking in the narcotics that were seized. Alternatively, if the jury rested its verdict on a finding that respondents were members of the conspiracy *before* the seizure, the jury necessarily based that finding at least in part on inferences drawn from respondents' efforts to traffic in the drugs *after* the seizure. Indeed, neither respondents nor the court of appeals suggested that there was any doubt whatever about respondents' participation in the conspiracy after the seizure, and the evidence in the case leaves no room to make any such suggestion. See Pet. 14-15.[4]

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[4] At respondents' first trial, the jury was not instructed that it had to make the findings required under *Cruz*, and it found respondents guilty. The district court found that the evidence was suffi-

In short, the verdict the jury reached—even under the incorrect instructions required by *Cruz*—necessarily included a finding that respondents participated at least in a single-load conspiracy involving the drugs that were seized. Accordingly, if the Court were to grant review in this case and agree with the government that such a finding is sufficient to support a conspiracy conviction, respondents' convictions should be affirmed.[5]

4. Respondents contend that the *Cruz* rule "in no way undermines the capacity of the United States to bring wrongdoers to justice," because under that rule the government simply must "select[] and plead[] a charge that is supported by the facts and then prov[e] that charge beyond a reasonable doubt." Br. in Opp. 12, 13. Respondents note that the holding in *Cruz* did not preclude a prosecution of the defendant there under other conspiracy charges (if such could be proved) and the holding did not preclude the defendant's conviction in that case for another, non-conspiracy offense. *Id.* at 12-13. As this case illustrates, however, the *Cruz* rule

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cient to support that conviction. Absent *Cruz*, there would have been no need for a second trial.

[5] Even if the instructional error were found to have precluded the jury from making the findings necessary to convict respondents under a correct understanding of the law, the government would be entitled to argue that the error was harmless under *Neder* v. *United States*, 527 U.S. 1 (1999), or, at a minimum that it is entitled to retry respondents under correct instructions. That would be a significant benefit to the government compared to the present judgment of the court of appeals, which entirely precludes the government from retrying respondents on the current indictment. See *Burks* v. *United States*, 437 U.S. 1 (1978) (appellate finding of insufficient evidence is comparable to an acquittal, and it precludes retrial under the Double Jeopardy Clause).

does result in the acquittal of defendants who have agreed to join a conspiracy when, unbeknownst to those defendants, the government has intervened to frustrate the fulfillment of the agreement. See Pet. 15. That fortuity is entirely irrelevant to respondents' liability under traditional principles of conspiracy law, see Pet. 9-12, and under the uniform view of the other courts of appeals that have addressed the issue, see Pet. 12-14. Further review is therefore warranted.

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For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2002